No. 15,134

IN THE

United States Court of Appeals

For the Ninth Circuit

MORRIS TRIEBER,
Appellant,

vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of the Estate of Gayne Sales Co., Inc., a Corporation, Bankrupt,
Appellee.

APPELLANT'S PETITION FOR A REHEARING

(Or, If a Rehearing Be Denied, for a Stay of the Mandate).

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To Honorable William Denman, Chief Judge, and Honorable Albert Lee Stephens and Honorable Frederick G. Hamley, Circuit Judges:

The petitioner in this cause respectfully prays Your Honors to grant a rehearing of the order and decree made by Your Honors herein dismissing the appeal.

The order of dismissal is made upon the sole ground that this Court lacks jurisdiction to review the order of the referee in bankruptcy and the order of the

District Court granting the motion to dismiss appellant's objections to the summary jurisdiction.

It is respectfully submitted that the decision of Your Honors falls within the provisions of Rule 19, subdivision (b) of the Rules of the Supreme Court of the United States, in this, that this Court has rendered a decision in conflict with the decisions of other courts of appeals and has so far sanctioned such a departure by a lower court as to call for the exercise of the Supreme Court's power of supervision unless a rehearing be granted.

We respectfully submit that Your Honors have committed error in dismissing the appeal upon each of the grounds set forth in Division I of the Argument set forth in Appellant's Opening Brief, pages 22-34, inclusive.

In addition thereto, we respectfully direct the attention of Your Honors to the following:

I.

THE STATUTE IS CLEAR AND UNAMBIGUOUS, AND THERE IS NO ROOM, THEREFORE, FOR JUDICIAL CONSTRUCTION THEREOF.

In the jurisdictional statement in Appellant's Opening Brief, we set forth the statute in *haec verba*. We set it forth again:

> "2. The jurisdiction of this Court upon appeal to review the order in question: Title 11, Section 47, United States Code:
>
> "*Jurisdiction of Appellate Courts:*
>
> "(a) The United States Courts of Appeals, in vacation, in chambers, and during their

> respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in *proceedings* in bankruptcy, *either interlocutory or final,* and in *controversies* arising in proceedings in bankruptcy to review, affirm, revise or reverse, both in matters of law and in matters of fact."

We submit that the emphasized language of the statute clearly refutes the statement of this Court:

> "The order is concededly interlocutory in nature. It follows that this court lacks jurisdiction to review such order."

It is submitted that the language of the statute in clear and no uncertain words confers jurisdiction of this appeal upon this Court, and as the Court cannot assume jurisdiction which it does *not* possess, it likewise cannot *refuse* jurisdiction which it *does* possess.

The elementary rule of statutory construction has been stated in a legion of cases:

> "Where the language of a statute is plain and unambiguous, there is no occasion for construction * * * An unambiguous statute must be given effect according to its plain and obvious meaning, and such unambiguous statute cannot be extended beyond its plain and obvious meaning, or restricted to, or confined in operation within, narrower limits or bounds than manifestly intended by the legislature."
>
> 82 C.J.S. 577-583, and 20 columns of decisions cited in footnotes.

Thus the Supreme Court of the United States in *Ex parte Collett,* 337 U.S. 55, 69 S.Ct. 944, 92 L.Ed. 1207, 10 A.L.R. 2d 921, repeats the rule as follows:

> "The plain words or meaning of a statute cannot be overcome by legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. Gemsco v. Walling, 324 U.S. 244, 260, 65 S.Ct. 605, 614, 89 L.Ed. 921. This canon of construction has received consistent adherence in our decisions."

II.

A REHEARING SHOULD BE GRANTED AND THE DECREE OF THE DISTRICT COURT REVERSED BECAUSE OF THE IMPORTANCE OF THE JURISDICTIONAL QUESTION INVOLVED AND THE HARDSHIP WHICH WILL BE INEVITABLY SUFFERED BY APPELLANT.

These matters we have pointed out at length in Appellant's Opening Brief. If this dismissal is allowed to stand, it merely means that appellant, regardless of the ultimate outcome of the proceedings before the referee and in the District Court, will be compelled to try once again an action for damages both compensatory and exemplary in a summary proceeding, without a jury, and in which he has already prevailed in the state court. The fees of the referee, of attorneys, of shorthand reporters will be large and the delay will be protracted into months—perhaps even into years. In the event of an adverse decision by the referee, the process will be repeated

in the District Court. If that Court upholds the summary and arbitrary jurisdiction of a referee to usurp the functions of a jury in actions of law, we must again undergo the expense of an appeal to this Court.

We submit that no litigant should be subjected to such harassment in a case where it clearly appears from the numerous decisions cited in the briefs of appellant that the referee lacks jurisdiction to make the turnover order prayed for by the appellee. (*Daniel v. Guaranty Trust Co.,* 285 U.S. 154, 52 S.Ct. 326, 78 L.Ed. 675; *Cline v. Kaplan,* 323 U.S. 97, 67 S.Ct. 155, 89 L.Ed. 97; *Maggio v. Zeitz,* 33 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476.)

CONCLUSION.

Appellant, therefore, respectfully petitions Your Honors for a rehearing; and, in the event that a rehearing be denied, for a stay of the mandate of this Court, to permit appellant to petition the Supreme Court of the United States for a writ of certiorari.

Dated, San Francisco, California,
October 3, 1956.

JOSEPH A. BROWN,
Attorney for Appellant and Petitioner.

Certificate of Counsel

I hereby certify that in my judgment the foregoing petition for a rehearing is well founded, both in law and in fact, and that it is not interposed for delay.

Dated, San Francisco, California,
October 3, 1956.

Joseph A. Brown,
Counsel for Appellant and Petitioner.